

A Sathiamoorthy a/l Ramakareshina v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
W-05-298 OF 2010

B ABDUL MALIK ISHAK, CLEMENT SKINNER AND LINTON
ALBERT JJCA
30 NOVEMBER 2012

C *Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction
and sentence — Dangerous drugs found concealed in car appellant had driven —
Whether there were serious errors committed in findings of fact by trial judge —
Whether trial judge erred by failing to recognise that evidence given by chemist
defective — Whether prosecution succeeded in proving possession — Whether trial
D judge failed to appreciate defence case — Whether trial judge's finding that defence
had failed to rebut presumption under s 37(h) of the Dangerous Drugs Act 1952
'secara imbalan kemungkinan' amounted to misdirection — Whether appellant's
conviction was safe — Dangerous Drugs Act 1952 s 37(h)*

E Acting on information received, a police party headed by Inspector
Muhammad Ikhbal bin Mohd Isa ('SP9') had conducted an observation of a
rest stop in Ulu Bernam to wait for the arrival of a Ford Telstar bearing
registration No BEA1968 ('the target motorcar'). When the target motorcar
passed the rest stop without stopping, SP9 and two other officers of the police
F party tailed the target motorcar, which eventually stopped at a petrol kiosk in
Sri Rampai. SP9 then saw the driver of the target motorcar ('the appellant'),
who was the only occupant in the target motorcar, alight from the car before
approaching and greeting two men. These two men were then observed
walking towards the target motorcar. SP9 instructed his police officers to arrest
G the two men, who were about to get into the target motorcar. At the same time
the appellant was arrested in the ladies' toilet after a scuffle. The arrestees and
the target motorcar were brought to the police station and at the station SP9
conducted a thorough examination of the target motorcar. Upon removing the
rear seats and a metal plate covering this compartment of the target motorcar,
H SP9 discovered six compressed blocks of plant material. Upon further
examination of the boot of the target motorcar, SP9 found another twenty
eight compressed blocks of the same material. The 34 blocks of compressed
plant material were later confirmed by the chemist in the chemist report to be
29,298g of cannabis. The appellant was charged with trafficking in the
cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA').
I The trial judge found that the prosecution had succeeded in establishing a
prima facie case and called upon the appellant to enter his defence. The
appellant testified that he had no knowledge of the cannabis in the target
motorcar. It was his defence that upon the request of his friend and employer,

one Selvam, he agreed to drive the target motorcar to the workshop for repairs. However, he had allegedly lost his way and then been instructed to drive to the petrol kiosk in Sri Rampai. Upon reaching the petrol kiosk, he had met the other two arrestees who had been asked to render assistance to him. The trial judge invoked the presumption under s 37(h) of the DDA against the appellant and in the absence of any reasonable explanation by the appellant found the appellant guilty of trafficking. The appellant was convicted of trafficking and sentenced to death. This was the appellant's appeal against that conviction and sentence. In his grounds of appeal the appellant submitted that the trial judge had misdirected himself by his failure to recognise that the evidence of the chemist was deficient and by failing to appreciate the defence case. The appellant submitted that the evidence given by the chemist was defective, in that the chemist had neither stated her qualifications nor expertise when giving evidence; had not given evidence of the various tests she had carried out in analysing the drug exhibits; and had not explained where she kept the drug exhibits when she was not analysing them to ensure that they were not mixed up with other exhibits.

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Held, dismissing the appeal:

- (1) The chemist's evidence was confined 'to the evidence of fact and not of opinion'. As such, there was no need for the chemist to show her expertise and experience as a government chemist. In any case, the fact that the chemist was employed by the Government of Malaysia would lead to the inference that she was qualified and that there was no need for her to adduce evidence as to her qualification in the field of chemistry. There was also no necessity for the chemist to show in detail what she did in her laboratory. In any case, even if the chemist did not state her qualification when she gave her oral evidence, the evidence adduced by the prosecution compelled this court to apply the proviso to s 60 of the Courts of Judicature Act 1964 and accept the chemist's evidence (see paras 29–31).
- (2) In reviewing the evidence adduced by the prosecution, particularly as to how the drugs were found concealed in the specially constructed compartments of the target motorcar driven by the appellant as the sole occupant from the rest stop until the petrol kiosk in Sri Rampai, showed that the prosecution had succeeded in proving possession — the most crucial and important ingredient in the charge of trafficking. Further, the conduct of the appellant in resisting arrest even before discovery of the drugs was a strong indicator of the appellant's knowledge of the drugs that he was transporting in the target motorcar. Thus, the trial judge was correct to infer that the appellant knew of the existence of the drugs in the target motorcar and rightly invoked the presumption under s 37(h) of the DDA against the appellant. The trial judge had also rightly considered that the act of the appellant in 'transporting' the cannabis from one place

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- A to another with the weight of the cannabis, which was 29,298g, amounted to trafficking as defined under s 2 of the DDA (see paras 33, 46–47).
- (3) The trial judge after considering both the versions of the prosecution and the defence, considered the prosecution's case again before holding that the defence had failed to raise a reasonable doubt in the prosecution's case and that the appellant had failed to rebut the presumption under s 37(h) of the Act. However, the trial judge had not said that the defence had failed to rebut the presumption under s 37(h) of the Act on the balance of probabilities (*secaraimbangan kebarangkalian*) but instead used the terminology '*secaraimbangan kemungkinan*'. Despite such a misdirection the evidence adduced by the prosecution was overwhelming and a reasonable tribunal would have convicted the appellant on the available evidence on a proper direction. Consequently, the conviction and sentence imposed by the trial judge were upheld (see paras 51 & 56).

[Bahasa Malaysia summary]

- Bertindak atas maklumat yang diterima, sepasukan polis yang diketuai oleh Inspektor Muhammad Ikhbal bin Mohd Isa ('SP9') telah menjalankan pemerhatian di sebuah hentian rehat di Ulu Bernam untuk menunggu ketibaan Ford Telstar bernombor pendaftaran BEA1968 ('motokar sasaran'). Apabila motokar sasaran tersebut melepasi hentian rehat tanpa berhenti, SP9 dan dua pegawai polis yang lain mengekori motokar sasaran, yang akhirnya berhenti di sebuah stesen minyak di Sri Rampai. SP9 kemudiannya melihat pemandu motokar sasaran tersebut ('perayu'), yang merupakan satu-satunya orang yang berada di dalamnya, turun dari motokar sebelum mendekati dan menegur dua orang lelaki. Kedua-dua lelaki tersebut kemudiannya diperhatikan berjalan ke arah motokar sasaran. SP9 mengarahkan pegawai-pegawai polis untuk menangkap kedua-dua lelaki tersebut, yang cuba untuk menaiki motokar sasaran. Pada masa yang sama, perayu telah ditangkap di dalam tandas wanita selepas suatu pergelutan. Tahanan-tahanan dan motokar sasaran telah dibawa ke balai polis dan di balai, SP9 menjalankan pemeriksaan menyeluruh ke atas motokar sasaran. Apabila menanggalkan tempat duduk belakang dan plat logam yang menutupi bahagian motokar sasaran ini, SP9 menemui enam ketulan mampat material tumbuh-tumbuhan. Pemeriksaan lanjut ke atas but motokar sasaran, SP9 menemui 28 lagi ketulan mampat material yang sama. 34 ketulan-ketulan mampat tersebut kemudiannya disahkan oleh ahli kimia dalam laporan kimia sebagai 29,298g ganja. Perayu didakwa mengedar ganja di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Hakim perbicaraan mendapati bahawa pihak pendakwa telah berjaya mewujudkan kes *prima facie* dan memerintahkan perayu untuk memasukkan pembelaannya. Perayu memberi keterangan bahawa dia tidak mempunyai pengetahuan tentang ganja dalam motokar sasaran. Adalah menjadi pembelaannya bahawa dengan permintaan rakan dan

majikannya, Selvam, dia bersetuju untuk memandu motokar sasaran ke bengkel untuk dibaiki. Walau bagaimanapun, dia mendakwa telah sesat jalan dan kemudian diarahkan untuk memandu ke stesen minyak di Sri Rampai. Apabila tiba di stesen minyak tersebut, dia telah bertemu dengan dua lagi tahanan yang telah diminta untuk memberi bantuan kepadanya. Hakim perbicaraan membangkitkan anggapan di bawah s 37(h) ADB terhadap perayu dan tanpa sebarang penjelasan munasabah oleh perayu, memutuskan perayu bersalah atas kesalahan mengedar. Perayu disabitkan atas kesalahan mengedar dan dijatuhkan hukuman mati. Ini adalah rayuan perayu terhadap sabitan dan hukuman. Dalam alasan rayuannya, perayu menghujahkan bahawa hakim bicara telah tersalah arah dirinya kerana gagal untuk menyedari bahawa keterangan ahli kimia tidak mencukupi dan gagal untuk mempertimbangkan kes pembelaan. Perayu menghujahkan bahawa keterangan yang diberikan oleh ahli kimia adalah cacat, yang mana ahli kimia tidak menyatakan kelayakannya mahupun kepakarannya dalam memberikan keterangan; tidak memberikan keterangan mengenai ujian-ujian yang telah dijalankannya dalam menganalisa ekshibit-ekshibit dadah tersebut, dan tidak menjelaskan tempat di mana dia menyimpan ekshibit-ekshibit dadah apabila dia tidak menganalisa kesemuanya, untuk memastikan bahawa kesemuanya tidak tercemar dengan ekshibit-ekshibit lain.

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Diputuskan, menolak rayuan:

- (1) Keterangan ahli kimia tersebut terbatas kepada 'keterangan fakta dan bukan pendapat'. Oleh itu, tiada keperluan untuk ahli kimia menunjukkan kepakaran dan pengalamannya sebagai ahli kimia kerajaan. Dalam mana-mana kes, fakta bahawa ahli kimia tersebut telah diambil oleh Kerajaan Malaysia akan membawa kepada inferens bahawa dia berkelayakan dan tidak perlu untuknya mengemukakan keterangan kelayakannya dalam bidang kimia. Tiada juga keperluan bagi ahli kimia untuk menunjukkan secara terperinci apa yang dilakukannya di makmal. Dalam apa jua kes, walaupun ahli kimia tidak menyatakan kelayakannya ketika memberikan keterangan lisan, keterangan yang dikemukakan oleh pihak pendakwaan mengkehendaki mahkamah untuk mengguna pakai proviso s 60 Akta Mahkamah Kehakiman 1964 dan menerima keterangan ahli kimia tersebut (lihat perenggan 29–31).
- (2) Dalam menyemak semula keterangan yang dikemukakan oleh pihak pendakwaan, khususnya tentang bagaimana dadah-dadah tersebut ditemui tersorok dalam petak khas yang dibina dalam motokar sasaran yang dipandu oleh perayu sebagai satu-satunya orang yang berada dalamnya, dari hentian rehat sehingga stesen minyak di Sri Rampai, menunjukkan bahawa pihak pendakwaan telah berjaya membuktikan milikan — intipati yang paling penting dan mustahak dalam pertuduhan pengedaran. Seterusnya, kelakuan perayu yang cuba mengelak daripada ditangkap sebelum dadah-dadah tersebut ditemui adalah petunjuk

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- A kukuh pengetahuan perayu akan dadah-dadah yang diangkutnya dalam motokar sasaran tersebut. Oleh itu, hakim perbicaraan adalah tepat dalam membuat kesimpulan bahawa perayu mengetahui kewujudan dadah-dadah dalam motokar sasaran tersebut dan dengan tepat membangkitkan anggapan di bawah s 37(h) ADB terhadap perayu.
- B Hakim perbicaraan juga telah, dengan tepat, mempertimbangkan bahawa perbuatan perayu dalam ‘mengangkut’ ganja dari satu tempat ke tempat yang lain dengan ganja seberat 29,298g, terjumlah kepada pengedaran sebagaimana yang ditakrifkan di bawah s 2 ADB (lihat perenggan 33, 46–47).
- C (3) Hakim bicara selepas mempertimbangkan kedua-dua versi pihak pendakwaan dan pihak pembelaan, telah mempertimbangkan kes pendakwaan lagi sebelum memutuskan bahawa pihak pembelaan gagal membangkitkan keraguan munasabah dalam kes pendakwaan dan bahawa perayu gagal mematahkan anggapan di bawah s 37(h) ADB.
- D Walau bagaimanapun, hakim perbicaraan tidak memutuskan bahawa pihak pembelaan gagal mematahkan anggapan di bawah s 37(h) ADB secara imbalan kebarangkalian tetapi sebaliknya menggunakan istilah ‘secara imbalan kemungkinan’. Walaupun telah tersalah arah, banyak keterangan-keterangan yang dikemukakan oleh pihak pendakwaan dan suatu tribunal yang munasabah akan menyabitkan perayu atas keterangan-keterangan yang terdapat atas arahan yang betul. Oleh itu, sabitan dan hukuman yang dijatuhkan oleh hakim bicara dikekalkan (lihat perenggan 51 & 56).]
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F Notes

For cases on trafficking, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 817–833.

G Cases referred to

- Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
 DPP v Brooks [1974] 2 All ER 840, PC (refd)
 Hairie Mahthinem v PP [2011] 8 CLJ 625, CA (refd)
 Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265; [1994] 2 CLJ 151, SC (refd)
- H Ong Ah Chuan v PP Koh Chai Cheng v PP [1981] 1 MLJ 64, PC (refd)
 Pendakwa Raya v Kang Ho Soh [1992] 1 MLJ 360, HC (refd)
 PP v Abdul Rahman bin Akif [2007] 5 MLJ 1, FC (refd)
 PP v Chia Leong Foo [2000] 6 MLJ 705, HC (refd)
- I PP v Nordin Awang [2000] MLJU 631; [2001] 1 AMR 855, HC (refd)
 PP v Saare Hama & Anor [2001] 4 MLJ 480; [2001] 4 CLJ 475, HC (refd)
 PP v Suzie Adrina bte Ahmad [2006] 5 MLJ 135, CA (refd)
 PP v Yuvaraj [1969] 2 MLJ 89, PC (distr)
 Ramis a/l Muniandy v PP [2001] 3 SLR 534, CA (refd)

Tan Ah Tee & Anor v PP [1980] 1 MLJ 49 (refd)

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Tunde Apatira & Ors v PP [2001] 1 MLJ 259; [2001] 1 CLJ 381, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60

Criminal Procedure Code ss 180, 399, 399(1), (2), (2)(c), (3)

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Dangerous Drugs Act 1952 ss 2, 37(h), 39B(1)(a), (2)

Evidence Act 1950 s 8

Appeal from: Criminal Trial No 45–51 of 2009 (High Court, Kuala Lumpur)

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Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant/accused.

Shoba Venu Gobal (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Malik Ishak JCA (delivering judgment of the court):

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INTRODUCTION

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[1] The appellant was convicted and sentenced to death by the Kuala Lumpur High Court for trafficking in dangerous drugs, to wit, 29,298g of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and punishable under s 39B(2) of the DDA. In its original text, the charge reads as follows:

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Bahawa kamu pada 13 Mei 2009 jam lebih kurang 5.40 petang di kawasan Stesyen Minyak Mobil Sri Rampai, Taman Sri Rampai, di dalam daerah Sentul, di dalam Wilayah Persekutuan, Kuala Lumpur, telah mengedar dadah berbahaya iaitu 29,298 gram cannabis, oleh yang demikian kamu telah melakukan suatu kesalahan di bawah section 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah section 39B(2) Akta yang sama.

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THE BRIEF FACTS OF THE PROSECUTION'S CASE

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[2] Acting on information received, on 13 May 2009 at about 2.30pm, Inspector Muhammad Ikhbal bin Mohd Isa ('SP9') led a team of police officers and took up positions at the R&R stop in Ulu Bernam and waited for the arrival of the target motorcar which was a Ford Telstar bearing registration No BEA 1968. At about 5pm, the target motorcar passed the rest stop without stopping.

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[3] SP9, who was in a motorcar driven by Sergeant Halim, together with Lance Corporal Khairul Anwar, tailed the target motorcar. SP9 was in the first

- A team and he sat in the front passenger seat and his view was unobstructed. The other members of the police officers were divided into three teams and they too were directed by SP9 to tail the target motorcar in their respective motorcars as well and they complied.
- B [4] SP9 and his team tailed the target motorcar from R&R stop in Ulu Bernam until Toll Plaza Jalan Duta and thereafter through the DUKE highway and then to Wangsa Maju and eventually stopped at a Mobil petrol kiosk in Sri Rampai. SP9 testified that he never lost sight of the target motorcar from the time he followed it until the target motorcar stopped at the Mobil petrol kiosk
- C at Sri Rampai. SP9 also confirmed that there was no other occupants in the target motorcar other than the driver — subsequently identified as the appellant.
- D [5] SP9 saw the appellant parked the target motorcar at the parking bay meant for tankers. SP9 also saw the appellant alight from the target motorcar and walk towards the convenience store. SP9 continued to observe the appellant and SP9 saw the appellant approach two male Malays — subsequently identified as Mohd Habil bin Mohd Ali Nupiah ('SP6') and Mohd Helmi bin Ismail ('SP11'), and greet them. According to SP11, the
- E appellant met SP6 for about one to two seconds. SP6 was seen holding onto something believed to be the keys to the target motorcar. Both SP6 and SP11 were seen walking to the target motorcar.
- F [6] SP9 instructed his police officers to arrest SP6, who was about to open the driver's side of the door of the target motorcar and SP11, who was near the front passenger door of the target motorcar. At about the same time, Ku Mohamad Azhar bin Ku Saat ('SP7') was arrested outside the convenience store while the appellant was arrested inside a ladies' toilet. During the arrest of the
- G appellant, a scuffle ensued.
- H [7] SP9 testified that he could smell the scent of ganja suspected to emanate from the target motorcar and he decided to examine the target motorcar at the Wangsa Maju Police Station because a crowd had gathered at the scene and the weather was turning bad.
- I [8] All the arrestees and the target motorcar — identified as the Ford Telstar bearing registration No BEA 1968, were brought to the Wangsa Maju Police Station. At the said police station, SP9 did a thorough inspection of Ford Telstar motorcar and upon removing the rear seats, SP9 noticed a metal plate covering a compartment. When the metal plate was removed, SP9 found that there were six compressed blocks suspected to be cannabis.
- [9] SP9 then proceeded to examine the boot of the Ford Telstar motorcar.

When the carpet was pushed to one side, SP9 noticed a metal plate soldered to the space meant for the spare tyre. Upon further examination, SP9 found another metal plate which was screwed tightly. And when the metal plate was removed, SP9 found that there were 28 compressed blocks suspected to be cannabis.

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[10] Altogether, SP9 recovered 34 compressed blocks suspected to be cannabis.

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[11] In due course, all these 34 compressed blocks were sent to the government chemist by the name of Madam Maimonah bt Sulaiman ('SP5') and she confirmed that they were cannabis weighing 29,298g. The chemist report of SP5 was also tendered and marked as exh 'P12'.

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PRIMA FACIE CASE

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[12] After conducting a maximum evaluation of the prosecution's case pursuant to s 180 of the Criminal Procedure Code ('CPC') and following closely the guidelines set by *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 and other related authorities, the learned trial judge held that the prosecution had succeeded in establishing a prima facie case and His Lordship then called the defence of the appellant for trafficking in the dangerous drugs as per the charge.

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THE APPELLANT'S DEFENCE

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[13] In essence, the defence of the appellant was that he had no knowledge of the drugs in the Ford Telstar motorcar because he was requested by one Selvam (his friend and employer) to send the said motorcar to the workshop for repairs. That workshop was located in Sri Rampai. The appellant was in Brickfields then and he was supposed to take the said motorcar from the parking area of the Jalan Duta toll. The appellant agreed and he took a taxi to go to the said parking area.

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[14] According to the appellant, Selvam came to the said parking area a little later in the Ford Telstar motorcar. Selvam was followed by Morithi a/l Govindasamy ('SD2'). The appellant then told Selvam that the appellant did not know where the workshop was located. Selvam then asked the appellant to drive to the Mobil petrol kiosk in Sri Rampai and someone would collect the said motorcar from him there. The appellant was also told not to switch off the engine of the said motorcar because of the difficulty in igniting the engine of the said motorcar. Selvam then left with SD2.

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[15] While driving the Ford Telstar motorcar to the Mobil petrol kiosk in Sri

- A** Rampai, the appellant lost his way and he telephoned Selvam for directions. Selvam told the appellant that Selvam's friend by the name of Sarani bin Baba ('SP8') would call the appellant and render assistance. SP8 telephoned the appellant and gave directions to the appellant as to the way to go to the Mobil petrol kiosk in Sri Rampai. When the appellant reached the said petrol kiosk,
- B** he parked the said motorcar and alighted from the said motorcar and left the engine running. According to appellant, two Malay gentlemen then approached the appellant and they identified themselves as friends of SP8. But SP8 had not arrived yet and so the appellant went to the convenience store to buy cigarettes and water. The appellant went to the ladies' toilet located within
- C** the convenience store and there he was arrested.

ANALYSIS

- D** [16] Only two grounds were advanced before us in challenging the conviction of the appellant for trafficking in the dangerous drugs as per the charge:
- (a) that the learned trial judge misdirected himself when he failed to recognise that the evidence of the chemist is clearly deficient; and
- E** (b) that the learned trial judge misdirected himself when he failed to appreciate the defence case.

F THE FIRST GROUND

[17] The government chemist is SP5. Her evidence can be seen at pp 27–39 of the appeal record at *Jilid* 1. In examination-in-chief, SP5 testified as follows:

- G** Saya Maimonah bt Sulaiman, Ahli Kimia dalam Perkhidmatan Kerajaan Malaysia

[18] In SP5's chemist report, prepared pursuant to s 399 of the CPC which was tendered and marked as exh 'P12' as reflected at pp 16–17 of the appeal record at *Jilid* 3, she stated as follows:

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Saya MAIMONAH BT SULAIMAN, Ahli Kimia dalam Perkhidmatan Kerajaan Malaysia

- I** [19] And, finally, at p 17 of the of the appeal record at *Jilid* 3, SP5 signed her chemist report in this way:

Sgd (Illegible)

MAIMONAH BT SULAIMAN

Ahli Kimia

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Jabatan Kimia Malaysia.

[20] Yet, it was submitted that SP5's evidence suffered from the following defects:

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- (a) she never stated both her qualifications and expertise and there is no evidence that she is a chemist at the material time;
- (b) she never gave any evidence as to the various tests that were carried out for her to come to the conclusion that the substances she analysed were cannabis within the meaning of s 2 of the DDA; and
- (c) there is no evidence by her where she kept the drug exhibits when she was not analysing them to ensure that they were not mixed up with other exhibits.

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[21] While acknowledging that the experience of SP5 as a government chemist was not stated by SP5 in her oral testimony as seen at p 27 of the appeal record at *Jilid* 1, the learned deputy public prosecutor argued that SP5's evidence came within the ambit of s 399 of the CPC. That section states as follows:

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Reports of certain persons

399. (1) Any document purporting to be a report under the hand of any of the persons mentioned in subsection (2) upon any person, matter or thing examined or analysed by him or any document purporting to be a report under the hand of the Registrar of Criminals upon any matter or thing relating to finger impressions submitted to him for report may be given in evidence in any inquiry, trial or other proceeding under this Code unless that person or Registrar shall be required to attend as a witness —

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- (a) by the Court; or
- (b) by the accused, in which case the accused shall give notice to the Public Prosecutor not less than three clear days before the commencement of the trial:

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Provided always that in any case in which the Public Prosecutor intends to give in evidence any such report he shall deliver a copy of it to the accused not less than ten clear days before the commencement of the trial.

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(2) The following are persons to whom the provisions of this section apply:

- (a) officers of the Institute for Medical Research;
- (b) Government Medical Officers;
- (c) chemists in the employment of any Government in Malaysia or of the Government of Singapore;

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- A (d) any person appointed by the Minister by notification in the Gazette, to be a Document Examiner;
- (e) Inspector of Weights and Measures appointed as such under any written law relating to weights and measures in force in Malaysia; and
- B (f) any person or class of persons to whom the Minister by notification in the Gazette declares that the provisions of this section shall apply.
- (3) The persons referred to in subsection (2) and the Registrar of Criminals are by this Code bound to state the truth in reports made under their hands.

C [22] This section allows a report made by the persons mentioned in sub-s (2) to be admitted in evidence. The 'chemists in the employment of any Government in Malaysia or of the Government of Singapore' (see sub-s (2)(c)) are specifically mentioned as, 'The following persons to whom the provisions of this section apply'.

D [23] The learned deputy public prosecutor submitted that SP5 was called by the prosecution to testify and SP5's chemist report is admissible under s 399(1) of the CPC. Indeed SP5's chemist report was tendered as exh 'P12' as corroborative evidence of the oral testimony of SP5 and SP5's oral testimony tallied with her chemist report in exh 'P12'. The learned deputy public prosecutor further submitted by way of an analogy that if a chemist report has been served on the defence and no notice to cross-examine was given to the public prosecutor by the accused, then the chemist report like exh 'P12' is admissible even without the evidence as to the expertise of the government chemist. The learned deputy public prosecutor then referred to the proviso to s 399(1) of the CPC and submitted that in the event the chemist report is served to the accused not less than ten clear days before the commencement of the trial, then the chemist report will be tendered and marked as an exhibit and the prosecution need not call the government chemist as there is no necessity to introduce the government chemist's qualification and past experience.

G [24] The learned deputy public prosecutor further submitted that in a case where the prosecution relied on the chemist report, there was no necessity to call the government chemist to testify. Here, SP5 was called to testify and she testified that she had analysed all the exhibits given to her. But SP5 did not specify her qualification during her oral testimony as well as in her chemist report. However, it was emphasised that by virtue of SP5 being a government chemist, by implication she must be qualified in the field of chemistry. It was submitted that this issue was not considered by the learned trial judge because it was not raised before His Lordship and that His Lordship accepted the evidence of SP5 as a government chemist.

I [25] During her examination-in-chief, SP5 did not go into the details of her analysis but in cross-examination, SP5 testified at p 39 of the appeal record at *Jilid 1* that:

Saya jalani 4 ujian. Physical, microscopic, glc, DL. Ujian secara independent tidak muktamad, kena keempat-empat.

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[26] Under re-examination, SP5 testified as follows (see p 39 of the appeal record at *Jilid 1*):

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Ujian tersebut secara tersendiri tidak muktamadkan. Hasil daripada 4 ujian adalah muktamad dan conclusive dan adalah conclusive mengikut S 2 ADB 1952.

Jumlah sampel pembuktian hanya 1% peratus sahaja tetapi untuk ujian 3 & 4 adalah hasil daripada keseluruhan sampel sebab untuk ujian 4 & 2 dan microscopic fizikal. Saya jalankan atas 100% bahan tumbuhan setelah berpuashati bahan tumbuhan daripada jenis tumbuhan yang sama baru saya boleh ambil sampel perwakilan untuk ujian 3 dan 4 sama seperti saya telah analisis 100%.

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[27] At this juncture, it is germane to refer to the decision of Tun Dato Seri Abdul Hamid bin Omar, the Lord President of the Supreme Court in the case of *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265; [1994] 2 CLJ 151. At pp 270–273 (MLJ); 152–153 (CLJ) of the headnote, His Lordship aptly laid down the law in this way:

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(2)(a) It is appropriate at the outset to determine whether the evidence of a chemist on the identity of a drug constitutes evidence of fact or opinion and to consider the attendant issue governing the admissibility of such evidence. If the chemist's evidence is factual, he is competent to give evidence like any other witness, and the law on the admissibility of such evidence would apply. If the chemist's evidence constitutes an opinion, then his evidence would come under the category of expertise evidence. In that case the question of his competency to give expert evidence arises.

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(b) The evidence of the chemist on the identity and weight of the drug constitutes evidence of fact and not of opinion. Therefore, the question of adducing evidence to show the expertise of the chemist does not arise.

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(c) What is really required for the prosecution to show for the admission of the chemist's evidence on the identity of the drug is merely to adduce evidence as to his qualification in the field of chemistry and that he is a chemist in the employment of any Government in the Federation and had examined or analysed the drugs. His evidence may then be given orally or to be set out in a report made by him to be admitted under s 399 of the Criminal Procedure Code.

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(d)

- (i) Unless the evidence is so inherently incredible that no reasonable person can believe it to be true, it should be accepted as prima facie evidence.
- (ii) So long as the evidence is not inherently incredible or the defence does not call evidence to show that the chemist's findings are not valid scientifically, there is no necessity for the chemist to show in detail what he did in his laboratory.

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A (e) In the ultimate analysis it is the court's considered judgment that the need to establish the expertise of the factual witness does not arise. However, expertise and qualification of an expert witness must be established where the evidence consists of not only direct factual observation but of opinion.

B [28] Augustine Paul J (later FCJ) in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705 echoed the same sentiments when he applied, inter alia, *Khoo Hi Chiang's* case and held that (see p 706 of the headnote):

C (4) As the evidence of the chemist on the analysis of drugs by him was not evidence of opinion but evidence of fact, he need not give particulars of the tests carried out by him in his evidence. It follows that his report, tendered in evidence under s 399(1) of the Criminal Procedure Code, also need not contain such particulars. In any event, the court was entitled to accept the evidence of the chemist on its face value without the necessity for him to go into details of what he did in the laboratory
D step by step unless it is inherently incredible or the defence calls evidence in rebuttal by another expert. Thus if the accused was dissatisfied with the conclusion reached by the chemist, it was for him to summon the chemist as a witness for that purpose or adduce evidence in rebuttal. This had not been done by the accused in this case. The chemist report tendered in evidence in this case was therefore not defective.

E [29] In our judgment, SP5's evidence was confined 'to the evidence of fact and not of opinion'. That being the case, SP5's evidence need not show her expertise and experience as a government chemist. There was also no necessity
F for SP5 to show in detail what she did in her laboratory.

[30] Since the evidence of SP5 as a government chemist is factual, she is to be treated like any other witness. The fact that SP5 described herself as a chemist employed by the Government of Malaysia, it must be inferred that she is qualified in the field of chemistry and there is no necessity to adduce evidence as to her qualification in the field of chemistry. Government chemists working for the Government of Malaysia are considered as persons to whom s 399(2) of the CPC applies and by virtue of sub-s (3) to s 399 of the CPC, she is bound to state the truth in her chemist report marked as exh 'P12'.
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[31] We are completely convinced that even though SP5 did not state her qualification when she gave her oral evidence, the overwhelming evidence adduced by the prosecution compelled us to apply the proviso to s 60 of the Courts of Judicature Act 1964 which states:
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Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

[32] This was also the approach adopted by Edgar Joseph Jr SCJ who wrote a separate judgment in the *Khoo Hi Chiang's* case at pp 293 (MLJ); 174 (CLJ).

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[33] In reviewing the evidence adduced by the prosecution, particularly as to how the drugs were found in the specially constructed compartments of the Ford Telstar motorcar driven by the appellant, the prosecution has succeeded in proving possession — the most crucial and important ingredient in the charge of trafficking. The learned trial Judge invoked the presumption under s 37(h) of the DDA against the appellant and that section reads as follows:

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37. In all proceedings under this Act or any regulation made thereunder —

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(h) if any dangerous drug is found concealed in any compartment, specially constructed for the purpose, on any vehicle, it shall until the contrary is proved, be deemed to have been so concealed with the knowledge of the owner of the vehicle and of the person in charge of the vehicle for the time being.

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[34] The damning evidence showed that:

- (a) the appellant was seen by SP9 driving the Ford Telstar motorcar from R&R stop in Ulu Bernam until he reached the Mobil petrol kiosk in Sri Rampai;
- (b) the appellant was seen by SP9 driving alone at the material time;
- (c) the drugs were found concealed at the specially constructed compartments behind the back passenger seat and in the boot underneath the spare tyre space;
- (d) upon opening the door to the Ford Telstar motorcar, PW9 sensed a strong smell of cannabis inside the said motorcar;
- (e) there were altogether 34 slabs of cannabis concealed in the Ford Telstar motorcar; and
- (f) the appellant resisted arrest even before the discovery of the said drugs.

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[35] Proof of the specially constructed compartments in the Ford Telstar motorcar came from the evidence of Tee Kok Lee ('SP4'), the head of the Ford service division. SP4 testified that he was with the Ford company since 1986 and after examining the said motorcar he said that it had been altered by the addition of two specially constructed compartments. SP4's evidence was considered by the learned trial judge in his written grounds of judgment at pp 220–221 of the appeal record at *Jilid 2*:

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Pihak pendakwaan juga telah memanggil Encik Tee Kok Lee, Ketua Bahagian Service Ford (SP4) untuk memberi keterangan sama ada tempat dadah jenis ganja tersebut dijumpai telah dibuat khas atau telah wujud dari asal lagi semasa kenderaan

- A itu dibeli dan pembuatnya. Beliau telah bertugas dengan syarikat ini sejak tahun 1986 lagi. Menurut SP4, setelah dibuat pemeriksaan beliau dapati kereta ini telah diubahsuai. Merujuk kepada gambar P6(A), di belakang kerusi penumpang belakang terdapat sekeping besi yang menutup dan diikat dengan screw. Besi penutup tersebut telah ditanda sebagai 'X' oleh SP4 di P6A. Menurut SP4 kereta
- B Ford Telstar dari jenis yang sama tidak sepatutnya mempunyai besi sebegini. SP4 juga dapati bahagian lubang untuk tayar spare juga telah ditutup dengan sekeping besi dan dipateri oleh itu lubang untuk meletak tayar spare tidak boleh dilihat lagi. Seterusnya pemeriksaan di bahagian bawah kereta di tempat tayar spare terdapat lubang yang dipotong sepertimana gambar P6(C) dan (D). Semasa pemeriksaan dibuat oleh SP4 lubang ini tidak bertutup. Menurut SP4 lagi pada keadaan biasa
- C untuk kereta jenis ini tidak sepatutnya ada penutup dari boot dan pada tempat tayar spare. Secara mata kasar boleh diputuskan tiada kereta buatan kilang akan menghasilkan kekemasan yang begitu kasar terutamanya untuk kereta persendirian malah jentera berat sekali pun dicat dengan kemas.
- D [36] Through the evidence of SP4, knowledge of the concealment of the drugs in the specially constructed compartments of the Ford Telstar motorcar shall be deemed against the appellant who was the driver of the said motorcar at the material time.
- E [37] It is acknowledged that the appellant was not the registered owner of the Ford Telstar motorcar and this was also considered by the learned trial judge.
- F [38] According to Saw Phoi Liang ('SP10'), the head of the individual registration and record units of the Road Transport Department, the Ford Telstar motorcar was owned by Zaiful Anuar bin Syed Omar ('SP3'). SP3 testified that he used the said motorcar for about a week after he had purchased it and he discovered that the said motorcar had engine trouble and so he
- G decided to sell the said motorcar. For this purpose, SP3 handed the said motorcar to his cousin by the name of Syed Khairi Din bin Syed Abdullah ('SP13'). And SP13 testified that he sold the said motorcar to a male Indian whose name he did not know and that he used to meet the male Indian before. It seemed that when SP13 was giving his evidence, the learned deputy public
- H prosecutor having conduct of the prosecution commented that SP13's oral evidence contradicted SP13's statement that was recorded by the investigating officer of the case by the name of Inspector Prakphat a/l Tim ('SP15'). SP13 denied that he had told SP15 that the male Indian who had bought the said motorcar was Sathiamoorthy. Be that as it may, it transpired that SP13 had lodged a police report vide Alor Setar Report No 23217/09 marked as exh
- I 'P59' and in that police report, SP13 stated that he received a telephone call from a male Indian who threatened him not to be a witness in this case. That police report marked as exh 'P59' can be seen at p 41 of the appeal record at *Jilid 3* and it was worded as follows:

Pada sebulan lepas semasa saya sedang berada di rumah alamat 976 Lorong Syarif Jln Langgar, 05200 Alor Setar, Kedah telah terima panggilan telefon dari 1 lelaki India yang tidak dikenali menggunakan 'private number' mengugut saya jika saya mahu selamat jangan jadi saksi dan jangan terima surat biru dari pihak polis. Pada 24/11/2009 saya telah terima satu surat minta saya hadir bicara di Mahkamah Tinggi Bahagian Jenayah Kuala Lumpur. Tujuan buat report kerana takut jadi apa-apa dan bimbang akan keselamatan saya. Datang Balai buat report. Sekian laporan saya.

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[39] However, both SP3 and SP13 admitted that when the Ford Telstar motorcar was in their possession, no alterations were made to the said motorcar like what it is now done by incorporating specially constructed compartments in the said motorcar.

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[40] It is ideal, at this juncture, to examine three authorities on s 37(h) of the DDA. For starters, reference is made to the case of *Khoo Hi Chiang* where the trial judge viewed the motorcar BAP 1330 ('motorcar') which the appellant Khoo was driving on the date and at the time and place specified in the charge and in which the appellant Lee, the registered owner of the motorcar, was travelling as the sole passenger until he disembarked at the Butterworth Railway Station. It was from the petrol tank of this motorcar that the police recovered the opium. The trial judge inspected the petrol tank from the boot of the motorcar as well as from the inside of the said motorcar. The trial judge noted, after inspection, welding marks on both sides of the petrol tank as well as a partition in the petrol tank. The trial judge put his hand in the petrol tank and touched the partition which divided the petrol tank into two compartments. The trial judge found that the position of the partition corresponded with the position of the welding marks. The trial judge also saw a hole in the petrol tank which was covered by the screwed flap and that there was a board in the boot to cover the petrol tank. After the inspection, the trial judge had no difficulty in concluding that the petrol tank had been modified so as to create a special compartment for the purpose of concealing the opium. The prosecution also called a motor technician who was familiar with Toyota motorcars and he testified that the petrol tank had been modified to such an extent that the capacity of the petrol tank to carry petrol had been reduced to one-fifth. The trial judge invoked s 37(h) of the DDA and convicted and sentenced both the appellants to death. The Supreme Court confirmed the decision of the trial judge.

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[41] The second authority would be that of *Public Prosecutor v Saare Hama & Anor* [2001] 4 MLJ 480; [2001] 4 CLJ 475, a decision of the late Vincent Ng J (later JCA). In that case, the blue Honda Accord motorcar bearing a Thai registration number plate was examined in the parking lot of the toll plaza in the presence of both the accused, but nothing incriminating was found. With

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- A the aid of a T-shaped screw-driver, DSP Yusuh bin Mat Taib ('PW4') took out two screws behind the passenger seat which separated a partition and found hidden between the back seat and the audio set, some compressed blocks of plant material suspected to be cannabis. PW4 then brought both the accused and the blue Honda Accord motorcar to the Jitra Police Station and in their
- B presence, PW4 conducted a thorough examination of the said motorcar. PW4 found and recovered 48 compressed blocks of cannabis hidden behind the passenger seat. The prosecution called Chiew Kiah Han ('PW7'), the technical assistant of the Penang Kah Motor Co Sdn Bhd. PW7 testified that the
- C compartment was not normally found in a new or original Honda Accord of similar model sold in West Malaysia. Under cross-examination, PW7 conceded that he had no knowledge or experience in respect of the back configuration of motorcars of similar models to the blue Honda Accord motorcar that were assembled or sold in Thailand. PW7 agreed in cross-examination that the rear
- D compartment in the blue Honda Accord motorcar may not be a specially constructed compartment as it may be found in such motorcars sold in Thailand. The prosecution sought to invoke s 37(h) of the DDA. The defence argued that the cannabis were found concealed but not in 'any compartment specially constructed'. The late Vincent Ng J (later JCA) held that the
- E presumption under s 37(h) of the DDA was inapplicable because of the evidence of PW7.

- [42] The third authority would be the case of *Public Prosecutor v Nordin Awang* [2000] MLJU 631; [2001] 1 AMR 855. In that case the dangerous
- F drugs were found underneath the floor of the van. The court conducted a physical inspection of the van and found that the floor of the said van was fully carpeted and that the drugs were not visible to the naked eye. The prosecution relied on s 37(h) of the DDA. Alauddin bin Mohd Sherif J (later the President of the Court of Appeal) held that s 37(h) of the DDA merely presumed the
- G element of knowledge and His Lordship acquitted and discharged the accused on the ground that the prosecution failed to prove exclusive custody and control over the dangerous drugs.

- [43] Here, the learned trial judge scrutinised the evidence of the prosecution and invoked s 37(h) of the DDA when His Lordship called for the defence of
- H the appellant for trafficking in the dangerous drugs as per the charge. This was what His Lordship said at pp 231–232 of the appeal record at *Jilid 2*:

- I Memandangkan dadah ditemui di dalam kompartmen yang dibina khas dalam kereta BEA 1968 yang pada ketika itu dipandu oleh tertuduh seorang diri dari RR Ulu Bernam sehingga ke stesyen Mobil Taman Sri Rampai oleh itu anggapan pengetahuan di bawah seksyen 37(h) Akta adalah terpakai. Selain dari itu saksi polis yang menangkap tertuduh iaitu Sjn Zaini (SP14) memberi keterangan bahawa tertuduh cuba melawan dan terkejut bila diperkenalkan polis sebelum tangkapan. Walaupun pergelutan dan cubaan melawan itu tidak dapat berdiri secara tersendiri

sebagai bukti pengetahuan namun ianya dapat menyokong fakta yang tertuduh mengetahui perbuatan jenayahnya itu dan bila terjumpanya dadah sejurusnya maka ianya bersesuaian dengan tindak-tanduk penjenayah. Selain dari itu juga, saksi utama SP9 yang memeriksa dari awal ke atas kereta tersebut mengesahkan terdapat bauan cannabis yang kuat. Perlu juga diambil ingatan tuannya dadah tidak akan membiarkan dadah yang begitu banyak dengan nilai yang tinggi dibawa oleh seseorang yang tidak bersekongkol dengan pengedaran dadah atau tidak tahu menahu tentang dadah di dalam kereta tersebut. Dengan kata lain tertuduh jika benar tidak mengetahui dadah di dalam kereta tersebut akan dapat perasan kehadiran dadah tersebut atas sebab baunya. Oleh itu secara keadaan biasapun tanpa anggapan atau penggunaan anggapan di bawah seksyen 37(h), tertuduh dikatakan mengetahui kehadiran dadah itu.

Oleh itu dengan kawalan ke atas kereta yang hanya oleh tertuduh (pemilikan), jumlah dadah yang begitu banyak hampir 30 kilogram tidak munasabah untuk kegunaan tertuduh sendiri dan di'angkut atau dibawa' (transporting, carrying, sending and delivering) dengan kereta oleh tertuduh. Seksyen 2 Akta mentakrifkan 'pengedaran' sebagai;

'includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act';

Fakta ubahsuaian kereta tersebut secara khas (seksyen 37(h) Akta) dan bau cannabis dan melawan semasa tangkapan adalah unsur-unsur pengetahuan. Dengan itu ianya adalah secara penilaian maksima memenuhi keperluan di bawah seksyen 180 KAJ untuk mahkamah ini memutuskan pihak pendakwaan berjaya mewujudkan suatu kes prima facie dan tertuduh perlu dipanggil membela diri.

[44] Whether the appellant was in possession of the drugs at the material time is a question of fact (*Pendakwa Raya v Kang Ho Soh* [1992] 1 MLJ 360 at p 371). The whole gamut of the facts must be considered and that would show whether the appellant was in possession of the drugs. The lynch-pin to the charge of trafficking is possession. It must be recalled that SP9 and the police party tailed the appellant who drove the Ford Telstar motorcar without stopping from R&R Ulu Bernam until the Mobil petrol kiosk in Sri Rampai. The appellant was alone in the said motorcar and when he was arrested inside the ladies' toilet at the convenience store, he resisted arrest even before the discovery of the drugs in the specially constructed compartments of the said motorcar. Knowledge can be inferred from the conduct of the appellant in resisting arrest and such conduct is admissible under s 8 of the Evidence Act 1950. The guilt of the appellant is reflected by his conduct. Such conduct reflects the state of the appellant's mind. It is a strong indicator of the appellant's knowledge of the drugs that he was transporting in the Ford Telstar motorcar. In regard to knowledge Gopal Sri Ram JCA (later FCJ) had this to say in *Public Prosecutor v Suzie Adrina bte Ahmad* [2006] 5 MLJ 135 (CA) at p 140:

A But knowledge like any other state of mind is a fact that is to be inferred from proved or admitted circumstances of a particular case.

B [45] There is a nexus between the conduct of the appellant in resisting arrest even before the discovery of the drugs in the Ford Telstar motorcar and the offence of trafficking. It is from this nexus or connection that knowledge can be inferred (*Public Prosecutor v Chia Leong Foo*). Even an attempted flight entitled the court to draw an inference of knowledge like the case of *DPP v Brooks* [1974] 2 All ER 840. There at p 843, the distinguished Lord Diplock had this to say:

C On the evidence, including his own statement to the police, the 19 sacks of ganja were clearly in the physical custody of the respondent and under his physical control. The only remaining issue was whether the inference should be drawn that the respondent knew that his load consisted of ganja. On all the evidence and in particular the fact that he and the other occupant of the van attempted to run away as soon as they saw the uniformed police approaching, the magistrate was, in Their Lordships' view, fully entitled to draw the inference that the respondent knew what he was carrying in the van.

E [46] In our judgment, the learned trial judge was correct to infer that the appellant knew of the existence of the drugs in the Ford Telstar motorcar and His Lordship rightly invoked the presumption under s 37(h) of the DDA against the appellant. In the absence of any reasonable or plausible explanation by the appellant, the facts as narrated earlier were sufficient for the learned trial judge to find the appellant to be in possession of the drugs (*Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1 (FC); *Ramis a/l Muniandy v Public Prosecutor* [2001] 3 SLR 534 (CA); and *Tan Ah Tee & Anor v Public Prosecutor* [1980] 1 MLJ 49 (CA), Singapore).

G [47] The learned trial judge rightly considered that the act of the appellant in 'transporting' the cannabis from one place to another coupled with the weight of the cannabis which was 29,298g amounted to trafficking of the said cannabis as defined under s 2 of the DDA (*Ong Ah Chuan v Public Prosecutor Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64 (PC)). And the quantity of the cannabis was not likely for the appellant's own consumption. Rather, it was for the purpose of trafficking in them.

H I THE SECOND GROUND

[48] The learned trial judge narrated the defence in extenso as seen at pp 235–237 of the appeal record at *Jilid 2* and rejected the defence because it failed to rebut the presumption under s 37(h) of the DDA on the balance of

probabilities. His Lordship also analysed the defence as reflected at pp 237–239 of the appeal record at *Jilid 2* as follows:

Penelitian semula Mahkamah di akhir kes pembelaan

Saya telah meneliti keseluruhan keterangan kes pendakwaan dan pembelaan oleh tertuduh serta saksi beliau (SD2) dan saya mendapati bahawa tertuduh telah gagal untuk membangkitkan apa-apa keraguan yang munasabah terhadap kes pendakwaan dan gagal mematahkan anggapan undang-undang di bawah seksyen 37(h) di atas imbalan kemungkinan yang dia mengetahui kereta yang beliau pandu itu membawa dadah berbahaya dalam bahagian khas yang diubahsuai.

Saya juga berpuashati tanpa sebarang keraguan yang munasabah dan tidak dipertikaikan bahawa 29,298 gram cannabis dijumpai tersorok di dalam kompartmen yang dibina khas di dalam kereta BEA 1968 adalah dalam pemilikan dan pengetahuan tertuduh. Saksi pendakwaan SP9 dan SP14 pertama kali beliau melihat kereta BEA 1968 di R & R Ulu Bernam dan seterusnya mengekori kenderaan tersebut sehingga ke stesyen minyak Mobil di Taman Sri Rampai adalah konsisten bahawa tertuduh sahaja yang mengawalinya. Keterangan mereka tidak tercabar semasa pemeriksaan balas oleh peguambela tertuduh.

Penafian oleh tertuduh akan ada bau dadah cannabis atas alasan cermin tingkap tidak ditutup dan tertuduh menghisap rokok juga adalah gagal menepis anggapan pengetahuan yang dipikulnya di bawah seksyen 37(h) Akta. Alasan membuka tingkap kerana menghisap rokok adalah satu alasan yang gagal mematahkan anggapan pengetahuan oleh sebab saksi pendakwaan dapat mengesan bau cannabis semasa membuat pemeriksaan di tempat kejadian. Cannabis sememangnya mengeluarkan bau yang kuat dan tidak secara imbalan kemungkinan dapat tertuduh menepis anggapan di bawah seksyen 37(h) Akta. Tambahan pula masakan tuannya dadah tanpa pengetahuan tertuduh membiarkan dadah yang begitu tinggi nilainya dibawa oleh tertuduh yang dikatakan tidak tahu menahu dan sudah tentu seseorang yang suci hati tidak akan berdiam diri apabila menghidu bau ganja di dalam kereta tentu akan lapor kepada polis.

Saya memutuskan secara keseluruhannya pihak pendakwaan telah berjaya membuktikan kes mereka tanpa keraguan yang munasabah manakala kes pembelaan gagal membangkitkan apa-apa keraguan terhadap kes pendakwaan dan gagal mematahkan anggapan pengetahuan bahawa tertuduh mengetahui dadah berada di dalam tempat yang direka khas.

Dengan itu tertuduh disabitkan dan dijatuhkan hukuman gantung sampai mati.

[49] We were referred to the decision of this court in *Hairie Mahthinem v Public Prosecutor* [2011] 8 CLJ 625 where the trial judge did not consider the version of the appellant at all and had not analysed or gave reasons as to why the defence version could not be believed. It was held by this court that the failure of the trial judge to consider the version of the appellant as against the prosecution's version constituted a fundamental misdirection that warranted appellate intervention. This court then allowed the appellant's appeal and his conviction was quashed and the sentence was set aside. We were told by learned

A deputy public prosecutor that the prosecution has since filed an appeal to the Federal Court against the decision of this court in *Hairie Mahthinem*'s case and the appeal has not been heard as yet by the Federal Court.

B [50] It must be borne in mind that in *Hairie Mahthinem*'s case, the prosecution's version was diametrically different from the defence version and despite this, the learned trial judge did not consider whether the appellant's version had cast a reasonable doubt on the prosecution's case.

C [51] Here, the learned trial judge after narrating and analysing the defence case alluded to the prosecution's case at the last part of his written grounds of judgment as seen at p 237 of the appeal record at *Jilid 2*. After considering both the versions of the prosecution and the defence, the learned trial judge considered the prosecution's case again and held that the defence failed to raise a reasonable doubt in the prosecution's case and that the appellant failed to rebut the presumption under s 37(h) of the DDA.

E [52] Every judge has his own style of writing. Writing skills of judges vary from one judge to another. Stimulating and engaging judgments will stir the minds of many readers. At the end of the day, the evidence will have to be examined. And evidence wise, the learned trial judge has analysed the defence case in the best way possible. His Lordship considered the evidence of the defence and rejected it. According to SP9, he and the police party tailed the appellant from the beginning till the end, namely, until the Mobil petrol kiosk at Sri Rampai.

G [53] The defence was not blaming SP6, SP7, SP8, SP11 and even SP2. The defence was also not blaming SP3 or SP13 who assisted in selling the Ford Telstar motorcar. The defence blamed Selvam for the appellant's predicament.

H [54] The learned trial judge considered s 37(h) of the DDA to infer knowledge of the appellant in regard to the specially constructed compartments in the Ford Telstar motorcar. His Lordship also said that even without the aid of the presumption in s 37(h) of the DDA, the strong smell of the scent of the *ganja* from the said motorcar prompted SP9 to examine the said motorcar at the Wangsa Maju police station and not at the scene of the crime bearing in mind that a crowd had started to gather at the scene of the crime and the weather was turning bad.

I [55] It must be recalled that in his defence, the defence testified that SP8 telephoned him and gave directions to the Mobil petrol kiosk in Sri Rampai. But, under cross-examination, SP8 testified that he never met the appellant

before he came to court and that he never spoke to the appellant nor knew him. The testimony of SP8 under cross-examination can be seen at p 66 of the appeal record at *Jilid 1*:

S: Setuju awak tidak pernah nampak Sathia sebelum datang ke Mahkamah?

J: Setuju. Saya juga tidak pernah bercakap dengan dia dan tidak berkenalan dengan dia.

[56] Having invoked the operative presumption that the dangerous drugs were concealed in the specially constructed compartments with the knowledge of the appellant who was in charge of the Ford Telstar motorcar on that fateful day under s 37(h) of the DDA, the learned trial judge did not say that the defence had not rebutted the presumption on the balance of probabilities (*'secara imbalan kebarangkalian'*) (*Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 (PC)). Instead His Lordship used this terminology, *'secara imbalan kemungkinan'*. But the evidence adduced by the prosecution is overwhelming and despite such a misdirection, we are satisfied that a reasonable tribunal would have convicted the appellant on the available evidence on a proper direction (*Khoo Hi Chiang's* case; and *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259; [2001] 1 CLJ 381 (FC)) and, consequently, we are constrained to uphold the conviction and sentence imposed by the learned trial judge.

[57] In our judgment, the defence had failed to rebut the presumption under s 37(h) of the DDA on the balance of probabilities. The evidence adduced point conclusively to the appellant that he was trafficking in the dangerous drugs as per the charge and the defence too had not raised a reasonable doubt as to his guilt which the prosecution had established beyond reasonable doubt. It is safe to convict the appellant.

[58] We unanimously dismissed the appeal of the appellant. We affirmed the conviction and sentence forthwith.

Appeal dismissed.

Reported by Kohila Nesan

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